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In the Supreme Court of the United States

ESTHER KIOBEL, ET AL.,

PETITIONERS,

v.

ROYAL DUTCH PETROLEUM CO., ET AL.,

RESPONDENTS.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE* COMPARATIVE LAW SCHOLARS AND FRENCH SUPREME COURT JUSTICE IN SUPPORT OF PETITIONERS ON THE ISSUE OF EXTRATERRITORIAL JURISDICTION

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Affaire Total (Bell)
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Attorney Gen. of Israel v. Eichmann
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Banco Nacional de Cuba v. Sabbatino
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Barcelona Traction
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BGE
(Swiss Federal Supreme Court) 41 474
(3 Juli 1915) 28

BGHZ
(German Federal Supreme Court in Civil
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1147 (1963) 28

BGHZ
40 N.J.W. 3203 (1987) 28

Doe v. Unocal Corp.
395 F.3d 932(9th Cir. 2002) 19

Ely Ould Dah v. France
ECtHR App. 13113/03 (17 Mar. 2009) 20

F. Hoffmann-La Roche Ltd v. Empagran S. A.
542 U.S. 155 (2004) 7

Germany v. Italy
Jurisdictional Immunities of the State (Ger. v. Italy), Application Instituting Proceedings (Dec. 23, 2008) 14

Jorgic v. Germany
ECtHR App. No. 74613/01 (July 12, 2007) 18

Kiobel v. Royal Dutch Petroleum Co.
621 F.3d 111(2d Cir. 2011) 21

Miranda v. State of Arizona
384 U.S. 436 (1966) 9

Murray v. Schooner Charming Betsy
2 Cranch 64 (1804) 7

Prosecutor v. Furundzija
Case No. IT-95-17/1-T, 155-156 (International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Territory of Former Yugoslavia Since 1991, Dec. 10, 1998) 31

RGZ
(German Federal Supreme Court of the Third Reich in Civil Matters) 142, 70 (20 Okt. 1933) 28

Rio Tinto v. Sarei
2011 WL 6934726 (2011) 13

Sanchez-Llamas v. Oregon
548 U.S. 331 (2006) 8

Sarei v. Rio Tinto PLC
671 F.3d 736 (2011) 33

Sosa v. Alvarez-Machain
542 U.S. 692 (2004) ..... *passim*

S.S. Lotus (Fr. v. Turk.)
1927, P.C.I.J. (ser. A) No. 10 (Sept. 7), Para. 46 ..... 15, 16

The Republic of the Congo
Cass. ch. cr., pourvoi no. 07-86412, 9 Apr. 2008 20

Underhill v. Hernandez
168 U.S. 250(1897) 35

FEDERAL STATUTES

United States Code
28 U.S.C. § 1350 13

Foreign Sovereign Immunities Act
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FOREIGN LAWS

BGBl [German federal law publication]
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Constitution (Belguim) 24

Constitution (France) 29

Constitution (Italy) 24

C. pén. (French Criminal Code) 19, 33

C. proc. pén. (French Code of Criminal
Procedure) ..... *passim*

Estato Orgánico del Ministerio Fiscal 50/1981
(30 Dec. 1981) (Spain) 25

Gerichtsverfassungsgesetz,
9 May 1975, Teil X, Art.s 141-152 24

Loi no. 64-1236 du 26 déc. 1964 19

Loi no. 71-1130 du 31 déc. 1971 28

N.C. proc. civ. (French Code of Civil
Procedure) 29

StPO (German Code of Criminal
Procedure) 20, 21, 33

VStGB (German Code of Crimes Against
International Law) 21

INTERNATIONAL TREATIES

Rome Statute of the International Criminal Court Art. 81, July 17, 1998, 2187 U.N.T.S. 90 25

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 595 U.N.T.S. 261 (ratified by the United States on Nov. 24, 1969) 8

MISCELLANEOUS

Michèle Alliot-Marie, *Réforme de la procédure pénale*,66-68 Gaz.Pal (March 7-9, 2010) 11

Kai Ambrose, *Prosecuting Guantanamo in Europe:Can and Shall the Masterminds of the Torture Memos"Be Held Criminally Responsible on the Basis of Universal Jurisdiction?*, 42 Case W. J. Int'l L. 405 (2009) 21

Antoine Bailleux, *La compétence universelle au carrefour de la pyramide et du réseau. De l'expérience belge à l'exigence d'une justice pénale transnationale* (2005) ... 8, 18

Antoine Garapon, *Peut-on réparer l'histoire? Colonisation, esclavage, Shoah* (2008) 14

Antoine Garapon & Ioannis Papadopoulos, *Juger en Amérique et en France* (2003) .. 22

Assemblée nationale
XIIIe legislature, 4 July 2011 20

John Bell, *French Legal Cultures 36* (Cambridge U.P., 2008) (2001) 24

Ian Brownlie, *Principles of Public International Law* (7th ed., Oxford, 2008) 15

Benoît Frydman, *L'affaire Total et ses enjeux, in Liber amicorum Paul Martens* (2007) .. 19

Jean Calais- Auloy, *Les délits à grande échelle en droit civil français*, 2 R.I.D.C. 379 (1994) 11, 33

Constitutional Relevance of Foreign Court Decisions, Debate between Justices Breyer and Scalia 9

Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes against Humanity: The Lipietz Case*, 56 Am. J. Comp. L. 363 (2008) 11

Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 Hastings L.J. 1 (1998) 25

René David, *French Law: Its Structure, Sources and Methodology* (Michael Kindred trans., 1972) 23

Mireille Delmas-Marty, Le flou du droit. Du code pénal aux droits de l'homme (2004) 11

Mireille Delmas-Marty, La refondation des pouvoirs (Les forces imaginantes du droit III) (2007) 21

Stewart Field, *State, Citizen, and Character in the French Criminal Process*, 33 J. L. & Soc 'y. 522 (2006) 23

Sévane Garibian, Le crime contre l'humanité au regard des principes fondateurs de l'État moderne. Naissance et consécration d' un concept (2009) 30

Marc Henzelin, *Le principe de l'universalité en droit pénal international. Droit et obligation pour les États de poursuivre et juger selon le principe de l'universalité* (2000) 12

Helmut Koziol, *Punitive Damages - A European Perspective*, 68 La.L.Rev. 741 (2008) 28

John Leubsdorf, *On the History of Legal Ethics, 8 U. Chi. L. Sch. Roundtable* 341 (2001) 22

Ugo A. Mattei et al., *Schlesinger's Comparative Law* (7th ed., 2009) 24, 25

Virginia G. Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 N.W. J. Int'l. L. & Bus. 272 (1999) 28

John Henry Merryman et al., *The Civil Law Tradition: Europe, Latin America, and East Asia* (1994) 28

Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 Am. J. Comp. L. 843 (2006) 10

Philip Milburn & Denis Salas, *Les procureurs de la République: De la compétence personnelle à l'identité collective*, in Étude sociologique et etude comparative européenne 137(CNRS, 2007) 25

Isabelle Moulier, *Observations sur l'Alien Torts Claims Act et ses implications internationales*, 49 Annuaire français de droit international 129 (2003) 11, 15

Parliamentary Assembly of the Council of Europe, Recommendation 1327, 24 Apr. 1997, § 8, vii 15

Rechtbank's-Gravenhage LJN: BV9748 14

Restatement (Third) of Foreign Relations Law of the United States §§ 402(1), (2) (1986) . 31

Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2d ed., Oxford, 2006) 12

Cristy Schmitz, *Binnie calls for corporate accountability.* The Lawyer's Weekly (Aug. 29, 2008) 15

Olivier de Schutter, *Les affaires Total et Unocal: complicité et extraterritorilité dans l'imposition aux enterprises d' obligations en matière de droits de l'homme*, 52 Annuaire français de droit international 55, 65 (2006) 19

Eberhard Siegismund, The Public Prosecution Office in Germany: Legal Status, Functions and Organization, 58-76, in UNAFEI Annual Report for 2001 and Resource Materials Series No. 60 (Sean Eratt, ed., 2003) 24

Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations*, 27 Yale J. Int'l L. 1 (2002) 11

Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 Notre Dame L.J. 313 (2011) 29

Annette Wieviorka, *La SNCF, la Shoah et le juge*, 316 Histoire 89 (2007) 27

INTEREST OF *AMICI CURIAE*[1]

Amici curiae (listed in the Appendix) are a French Supreme Court justice and United States, French, and German Professors of Law and legal scholars. They include:

- a Justice of France's Supreme Court of Public Law (*Conseil d'État*), formerly Justice of France's Constitutional Council (*Conseil constitutionnel*), who also is a legal scholar on French, European and constitutional law;

- the head of a governmental commission to revise the role of France's investigating magistrates, and emerita professor at the Collège de France, who held the chair of Comparative Law and Internationalization of Law;

- the Secretary General of France's *Institut des Hautes Études sur la Justice*, who also is a former judge, as well as a renowned public figure and comparative and international law scholar;

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[1] Consents to the filing of amicus curiae briefs are on file with the Clerk of Court pursuant to Rule 37 of the Rules of the Supreme Court of the United States. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

- the Dean of the Sorbonne (Paris I) Faculty of Law and past President of the European Society of International Law;

- a Professor of Law at the University of Bremen, Germany, who was a long-time law professor at the European University Institute, where he held the chair of European Economic Law;

- the Chief Reporter of the Restatement (Third) of the US Law of International Commercial Arbitration, as well as past President of the International Academy of Comparative Law and the American Society of Comparative Law, and chaired professor of law at Columbia University;

- a Professor of Law at Stanford University who is a prizewinning author of books and articles on French and American law and legal history; and

- a past U.S. member of the Austrian General Property Settlement Fund Committee, as well as past Secretary of the American Society of Comparative Law, and Professor of Law at the University of Pittsburgh.

Amici are familiar with both civil- and common-law legal systems throughout the world. They are

interested in clarifying the conceptual and practical characteristics of extraterritorial or universal criminal jurisdiction that is common in Code-based States with civil-law legal orders, as a means of establishing that the characteristics and function of universal criminal jurisdiction in civilian States are equivalent and analogous, although not identical, to extraterritorial civil jurisdiction under the ATS. The ATS is not unique in allowing financial recovery to foreign plaintiffs where an act has been committed by a foreign defendant in a foreign country.

SUMMARY OF ARGUMENT

Understanding other countries' domestic legal systems and practices is necessary to determining if United States law is in conflict with theirs, and more specifically if the United States would be unique in the world by allowing extraterritorial civil jurisdiction under the Alien Tort Statute ("ATS"). This brief will argue that universal criminal jurisdiction for *jus cogens* violations in civil-law States is analogous to extraterritorial civil jurisdiction under the ATS.

Unwarranted similarities between "criminal" and "civil" law in both legal orders have been assumed erroneously because both civil- and common-law systems have the same two classifications. They have significantly different meanings and functions in the different legal orders, however. United States tort law is more similar to civilian criminal law than to civilian civil law in many ways. "Civilian" in this brief denotes legal

systems, such as those of Continental Europe, emanating from Roman law and organized around a Civil Code. Civilian criminal law and United States civil law have comparable functions because of the roles of judges, prosecutors, and lawyers in the respective legal orders and societies, and because of the methods for victims to initiate legal actions in the criminal courts of civilian States, and in tort lawsuits in the United States.

Civilian judges specialize in either criminal or private law, with criminal-law judges in civilian States having a more didactic, public role than their private-law counterparts. Civilian prosecutors traditionally are non-partisan, neutral figures. Criminal trials, which include those that arise under universal jurisdiction, are public, and organized around a concentrated, oral event. Tort trials in civilian States, on the other hand, often take place exclusively in writing, with no oral testimony, and giving the public no opportunity to witness them. Where victims in civilian States join criminal trials as civil parties, they benefit from the State's resources and can be compensated financially. By contrast, in a tort suit, they would be barred from contingency fee arrangements and class action suits, so civil actions would not be an effective option for many.

Conversely, the aspects of criminal trials in civilian States which render extraterritorial or universal criminal jurisdiction appropriate in those legal systems do exist in United States tort law: both are aired in public; both allow victims effective

access to the court system; and both allow victims financial compensation. Although civilian States traditionally have rejected prosecutorial discretion, they have tended to adopt it to varying degrees for universal jurisdiction cases in the interests of international harmony. Similarly, in ATS cases, the Act of State and Foreign Sovereign Immunities Act restrain undue ATS extraterritorial jurisdiction.

ARGUMENT

I. UNDERSTANDING OTHER COUNTRIES' DOMESTIC LEGAL SYSYTEMS AND PRACTICES IS NECESSARY TO DETERMINING THAT ALIEN TORT STATUTE ("ATS") EXTRATERRITORIAL JURISDICTION IS NOT UNIQUE

A. UNDERSTANDING OTHER COUNTRIES' LEGAL SYSTEMS IS A PREREQUISITE TO DETERMINING IF UNITED STATES LAWS CONFLICT WITH THEIRS

This Court expressed concern at the oral argument held in this case on February 28, 2012 that the United States might be the only country to allow extraterritorial civil jurisdiction: "'No other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection.' "[2] Such a concern is

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[2]Justice Kennedy to Counsel for Petitioners, Official Transcript of Oral Argument, Subject to Final Review, at 3-4, (Feb. 28, 2012), available at http://www.supremecourt.gov/oral_arguments/argumen

particularly understandable in the context of the ATS' legislative history, since the statute was designed to increase the fledgling country's international harmony and to avoid unnecessary confrontation.[3] In light of this statutory aim, Justice Breyer's concurring opinion in *Sosa* specifically recommended as a criterion of ATS viability that

> the exercise of jurisdiction under the ATS [be] consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement. In applying

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t_transcripts/10-1491.pdf ("Transcript") ,*citing* amicus brief for Chevron; Justice Alito: "[T]he question is whether there's any other country in the world where these plaintiffs could have brought these claims against the Respondents.... Other than the country of citizenship of the defendants?" *Id.* at 7. *See also* Justice Alito to Counsel for Petitioners, *id.* at 11: "The first sentence in your brief in the statement of the case is really striking: "This case was filed ... by twelve Nigerian plaintiffs who alleged ... that respondents aided and abetted the human rights violations committed against them by the Abacha dictatorship ... in Nigeria between 1992 and 1995." What ... business does a case like that have in the courts of the United States?"

[3] *See Sosa v. Alvarez-Machain,* 542 U.S. 692, 715-18 (2004); Transcript at 12.

> those principles, courts help ensure that the potentially conflicting laws of different nations will work together in harmony, a matter of increasing importance in an ever more interdependent world.
>
> Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote.[4]

As Justice Breyer's comments suggest in *Sosa*, and as the above-referenced concerns this Court expressed at oral argument on February 28, 2012 also suggested, only an understanding of foreign laws and practices can resolve the issue of how ATS civil jurisdiction tallies with the practices of other nations.

B. UNDERSTANDING INTERNATIONAL LAW ALSO REQUIRES UNDERSTANDING FOREIGN LEGAL SYSTEMS

International law, also a part of ATS analysis, does not exist in a vacuum independently from the

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[4] *Id.* at 761 (Breyer, J., concurring, citing in part to *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U.S. 155, 164 (2004); and *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804)).

understandings of the nation-states that form it. This Court has also recognized the role that national legal systems play in shaping judicial understanding and interpretation of international law. Thus, in *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356-57 (2006), Chief Justice Roberts explained that relevant International Court of Justice ("ICJ") decisions concerning the Vienna Convention on Consular Relations[5] needed to be evaluated as emanating from a judiciary principally formed in magistrate-driven, inquisitorial legal systems.[6] In those nations, failure by a defendant to raise a Vienna Convention claim has a different substantive significance from such a failure within the United States' common-law, adversarial, party-driven system.[7] Without an understanding of the "other" legal systems behind fellow signatory States, one may be oblivious to international law's practical meaning. In the instant case, moreover, at oral argument on February 28, 2012, Chief Justice Roberts pointed to the intertwining of international with national law when he asked, "If ... there is no other country where this suit could have been brought, regardless of what

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[5] Apr. 24, 1963, 21 U.S.T. 77, 595 U.N.T.S. 261 (ratified by the United States on Nov. 24, 1969).

[6] *See also* Antoine Bailleux, La compétence universelle au carrefour de la pyramide et du réseau. De l'expérience belge à l'exigence d'une justice pénale transnationale 2 (2005) (« la loi de compétence universelle ne peut se comprendre sans le contexte qui l'entoure » [« universal jurisdiction or extraterritoriality law cannot be understood outside of its surrounding context »]). Unless otherwise noted, translations are by Vivian Grosswald Curran.

[7] Sanchez-Llamas v. Oregon, 548 U.S. 331, 356-57 (2006).

American domestic law provides, isn't it a legitimate concern that allowing the suit itself contravenes international law?"[8] When foreign civilian legal concepts are taken into account, and the labels used in those States and in the United States are translated conceptually rather than literally, it becomes clear that the instant suit could have been brought in other countries, and that it comes well within the accepted standards of international law.

C. AN INSUFFICIENT GRASP OF FOREIGN LAW HAS LED TO ERRONEOUS CONCLUSIONS IN THE INSTANT CASE

With respect to understanding foreign law, Justice Scalia has explained the pitfalls of poorly conducted legal analysis by pointing out that it is an error to associate the facially similar *Miranda* warning laws[9] of another country to those of the United States, if one overlooks the actual function of the laws in their respective legal systems as a whole.[10] More specifically, Justice Scalia pointed to analogies that have been made erroneously by ascribing similarity between the United States and systems that simultaneously grant *Miranda* rights, yet nevertheless subsequently permit confessions given without those warnings to be entered into evidence against the defendant.[11]

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[8] Transcript at 8.

[9] *See Miranda v. State of Arizona*, 384 U.S. 436 (1966).

[10] Constitutional Relevance of Foreign Court Decisions, Debate between Justices Breyer and Scalia, available at http://www.freerepublic.com/focus/f-news/1352357/posts.

[11] *Id.*

A similarly erroneous analogy has been made between the criminal and civil (i.e., non-criminal) law in common-law and civil-law legal orders, as it has between the public and private law of the two legal orders.[12] As the remainder of this brief undertakes to illustrate, identifying these phenomena within their legal spheres of operation shows that extraterritorial civil jurisdiction under the ATS comes within the logic of the universal criminal jurisdiction that civilian legal orders accept and, therefore, that the United States is not alone in allowing universal or extraterritorial civil jurisdiction for *jus cogens* violations.

II. UNIVERSAL JURISDICTION IN CIVILIAN CRIMINAL LAW IS ANALOGOUS TO ATS EXTRATERRITORIAL JURISDICTION IN *JUS COGENS* CASES BECAUSE UNITED STATES TORT LAW FULFILLS MANY OF THE SAME FUNCTIONS AS CIVILIAN CRIMINAL LAW

A. SIMILARITIES BETWEEN "CRIMINAL" AND "CIVIL" LAW CATEGORIZATIONS IN BOTH LEGAL ORDERS HAVE BEEN ASSUMED ERRONEOUSLY BECAUSE BOTH SYSTEMS HAVE THE TWO CLASSIFICATIONS

The tendency to equate erroneously the concepts of criminal and civil law in the United

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[12] *See, e.g.*, Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 Am. J. Comp. L. 843, 846-60 (2006).

States with those concepts in civilian legal systems is particularly tempting because both divisions exist in both systems, and under the same names of "criminal" (or "penal"), and "civil" law.[13] Indeed, the distinction between criminal and civil law is important on both sides of the Atlantic for categorizing legal phenomena.[14] When one looks at how the categories function in their respective legal systems, however, one can see that they have markedly different meanings and significances in common- versus civil-law legal orders.[15] Moreover, when one compares criminal and civil law *across* systems, one discovers that the categories blur because many of the functions of civilian States' criminal law are performed by tort law in the United States.[16]

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[13] In French "*droit pénal*" and "*civil*", in German "*Straf*" and "*Zivilrecht*", in Italian "*diritto penale* and *civile*".

[14] Perhaps the most obvious example of this is that civilian States have separate Civil and criminal codes. Those distinctions have been diminishing in clarity and increasing in porosity. *See, e.g.,* Jean Calais- Auloy, *Les délits à grande échelle en droit civil français,* 2 R.I.D.C. 379, 386 (1994) ; Michèle Alliot-Marie, « Réforme de la procédure pénale »,66-68 Gaz.Pal (March 7-9, 2010) ; Mireille Delmas-Marty, *Le flou du droit. Du code pénal aux droits de l'homme* (2004).

[15] Scholars have begun to take note of this. *See, e.g.,* Isabelle Moulier, *Observations sur l'Alien Torts Claims Act et ses implications internationales,* 49 Annuaire français de droit international 129 (2003); Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations,* 27 Yale J. Int'l L. 1 (2002).

[16] *See infra,* Section II,B,3 ; Stephens, *supra* last note; Vivian Grosswald Curran, *Globalization, Legal Transnationalization*

Where civilian legal systems grant universal jurisdiction to their courts with respect to the gravest of *jus cogens* violations,[17] these acts

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and Crimes against Humanity: The Lipietz Case, 56 Am. J. Comp. L. 363 (2008).

[17] Although some civilian States accept that international law standards can be directly applicable in national law, a principal stumbling block has been whether, in the absence of supporting national criminal code legislation, crimes of international law can be tried in civilian national courts. This stumbling block arises precisely because *jus cogens* violations are deemed justiciable only as crimes in criminal courts, and, pursuant to a well-known canon of Roman law, all crimes are subject to the rule that a textual law must define an act as a criminal violation before an individual can be tried for an act ("*nulla poene sine lege*"). Where, however national legislation codifies international criminal standards, national civilian courts, such as those in Belgium, Finland, France, Germany, Israel, Italy, Luxembourg, Spain, Sweden and Switzerland, are competent to try cases of universal jurisdiction, as accorded to varying degrees and in varying manners by those States' relevant constitutions, codes, statutes and other legal acts. *See generally* Marc Henzelin, Le principe de l'universalité en droit pénal international. Droit et obligation pour les États de poursuivre et juger selon le principe de l'universalité (2000) ; Luc Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives (2d ed., Oxford, 2006); Universal Jurisdiction in the European Union : Country Studies (REDRESS), available at http://www.redress.org/downloads/conferences/country%20studies.pdf . Some States do not require the defendant to be present in the courtroom, whereas in others, like Belgium and Spain, universal jurisdiction has been narrowed such that, since, respectively, 2003 and 2009, they now require the accused's presence. In Germany, on the other hand, where the universal jurisdiction statute, as all statutes, must be read in conjunction with the Constitution, Article 25 of the Constitution gives

traditionally have had to be tried within their legal orders as crimes. Thus, the ATS on its face seems unique in contemplating extraterritorial or universal jurisdiction for "*tort[s] only.*"[18] Consequently, it is not surprising that throughout their amicus brief for defendants on the subject of extraterritorial jurisdiction to the United States Court of Appeals for the Ninth Circuit in *Rio Tinto v. Sarei*,[19] the governments of the United Kingdom and Australia emphasized only that international law does not grant universal *civil* jurisdiction. They conceded, however, that it does grant universal criminal jurisdiction.[20] Similarly, at oral argument on February 28, 2012 before this Court, counsel for Respondents in the instant case stated that Respondents "concede that the ATS allows a civil remedy where the world would impose only criminal liability."[21]

In fact, the absence even of extraterritorial *civil* jurisdiction for *jus cogens* violations no longer is accurate even in all civilian legal systems, as the District Court in The Hague decided on March 21, 2012 to award Palestinian physician, Dr. Ashraf El-

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direct legal effect to general rules of public international law. *See* Reydam, *supra* this note, at 146.

[18] 28 U.S.C. § 1350 (emphasis supplied).

[19] Motion for Leave to File Brief as Amici Curiae and Brief of Governments of Australia and the United Kingdom of great Britain and Northern Ireland as Amici Curiae in Support of Petitioners on Certain Questions in Their Petition for a Writ of Certiorari, 2011 WL 6934726 (2011).

[20] *See id.*, n. 10.

[21] Transcript at 39.

Hojouj, damages in a civil court for torture he sustained at the hands of Libyan officials during his imprisonment on charges of having infected Libyan children with the HIV virus.[22] Neither the plaintiff nor the defendants were Dutch, nor did the torture take place in The Netherlands, nor had the defendants been tried criminally.[23] So far, the Dutch case is unusual in the civil-law world in not requiring a criminal conviction. Such cases have been knocking at the doors of civilian courts in recent years, however.[24] Moreover, the Council of

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[22] Rechtbank's-Gravenhage LJN: BV9748, available at : www.https://rechtspraak.nl. The defendant was not present. *See id.*

[23] Also noteworthy is the recent case of Germany v. Italy, Jurisdictional Immunities of the State (Ger. v. Italy), Application Instituting Proceedings (Dec. 23, 2008), http://www.icj-cij.org/docket/files/143/14923.pdf , in which the International Court of Justice ("ICJ") ruled that Germany was immune from civil liability for the war-time acts of German soldiers who massacred Greek civilians during the Second World War, and that Italy could not enforce a Greek civil court judgment against Germany against German assets located in Italy. Far from criticizing United States practice under the ATS, the ICJ did not raise the ATS as a problem, and more generally the court cited United States practice several times as consistent with accepted international practice, particularly with respect to restraints on civil liability for acts that properly give rise to sovereign immunity.

[24] *See, e.g.*, Antoine Garapon, Peut-on réparer l'histoire? Colonisation, esclavage, Shoah (2008); Curran, *supra* note 16. For an intermediate case, in which a French court granted plaintiffs recovery for crimes against humanity in a civil proceeding where the defendant had not yet been convicted criminally, see l'affaire Kovac, TGI Paris (14 mars 2011). The court, however, reasoned that, although the ICC's deliberations

Europe has urged Member States to enact legislation to allow for civil suits for victims of *jus cogens* crimes, expressly citing the ATS as a model.[25]

International law has not been the impediment to enacting such statutes. As Ian Brownlie states in *Principles of Public International Law*, "in principle [there is] no difference between the problems created by the assertion of civil and criminal jurisdiction over aliens."[26] Indeed, in the seminal *Lotus* case, the Permanent Court of International Justice defined each nation's prerogatives with respect to extraterritorial jurisdiction in broad terms:

> It does not follow that international law prohibits a State from exercising jurisdiction on its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on

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as to criminal acts were not final, the defendant's guilt as to the relevant acts was a given.

[25] *See* Parliamentary Assembly of the Council of Europe, Recommendation 1327, 24 Apr. 1997, § 8, vii, cited in Moulier, *supra* note 15, at 161. Justice Binnie of Canada's Supreme Court, speaking to the Canadian Bar Association, suggested the same for his country in 2008, also naming the ATS as a model. *See* Cristy Schmitz, *Binnie calls for corporate accountability.* The Lawyer's Weekly (Aug. 29, 2008).

[26] Ian Brownlie, Principles of Public International Law 300 (7th ed., Oxford, 2008).

> some permissive rule of international law ....Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[27]

Those limits were evoked some half a century later by Judge Fitzmaurice at the ICJ in *Barcelona Traction*:

> It is true that ... international law ... leaves to the States a wide measure of discretion. ... It does, however (a) postulate the *existence* of limits –

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[27] S.S. Lotus (Fr. v. Turk.), 1927, P.C.I.J. (ser. A) No. 10 (Sept. 7), Para. 46.

> though in any given case it may be for the tribunal to indicate what they are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another State.[28]

When in 2006, a defendant challenged his conviction by a Düsseldorf court on grounds that the Genocide Convention does not permit universal jurisdiction because it does not expressly accord it, the German Federal Supreme Court (*Bundesgerichtshof*), in a case later affirmed by the Federal Constitutional Court (*Verfassungsgerichtshof*), rejected the challenge: "The conviction of the accused by a German court on the basis of the universal jurisdiction principle is not forbidden under international law. Such a prohibition cannot be derived from Article VI of the Genocide Convention

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[28] Barcelona Traction, Light and Power Company, Limited, ICJ Reports 1970, 3 (Fitzmaurice, separate op.,) para. 70.

[despite the fact that] the Convention does not incorporate the universality principle ..."[29]

Notwithstanding the most recent exception of tort recovery without prior criminal conviction in the Dutch case noted above,[30] *jus cogens* cases have in general given rise to civil recovery within civilian nations only as part of, or subsequently to, criminal convictions. Under Belgian law, victims who wish financial compensation participate within the criminal actions as civil parties or *parties civiles*. Absolute universal jurisdiction existed in Belgium before 2003, but was restricted after plaintiff-triggered criminal suits mushroomed against every manner of former political leader the world over, who, moreover, under Belgian law as it then stood, could be tried in absentia.[31] Since 2003, the law instituted a measure of prosecutorial discretion, and now also requires the presence of the defendant, but it continues to afford universal jurisdiction for *jus cogens* crimes irrespective of the defendant's nationality or of the place where the acts at issue were committed.[32] Belgium continues actively to try universal jurisdiction cases. Perhaps of particular

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[29] Public Prosecutor v. Jorgic, in Reydams, *supra*, note 17, at 152-53 (translation by Luc Reydams). The European Court of Human Rights subsequently upheld Germany's right to make that decision under its universal jurisdiction powers in Jorgic v. Germany, ECtHR App. No. 74613/01 (July 12, 2007).

[30] *See supra* note 22.

[31] *See* Antoine Bailleux, La compétence universelle au carrefour de la pyramide et du réseau. De l'expérience belge à l'exigence d'une justice pénale transnationale (2005).

[32] *See id.*

interest to the instant case, is the Belgian *affaire Total*, in which Burmese nationals sued the French corporation, Total, in Belgium for complicity in crimes against humanity.[33] A post-2003 Belgian court dismissed charges on grounds unrelated to the defendant's being a corporation, and, indeed, the fact that the defendant was a corporation was never considered to be an obstacle to prosecution for complicity in a crime against humanity in a universal jurisdiction case.[34]

Victims in French cases can recover financially by constituting themselves as *parties civiles* to the criminal trials.[35] In France, domestic legislation incorporated crimes against humanity in 1964, just as the statute of limitations was about to expire on crimes committed during the Second World War, making the crime against humanity the only crime under French law to be without any limitations period.[36] In recent years, increasing

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[33] Cass. 29 juin 2005, P.O. 0482.F/1. This *affaire Total* had its parallel in France and its facts also formed the basis of the ATS case of *Doe v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002).

[34] *See* Belgian Affaire Total, *supra* last note; Olivier de Schutter, *Les affaires Total et Unocal: complicité et extraterritorilité dans l'imposition aux enterprises d'obligations en matière de droits de l'homme*, 52 Annuaire français de droit international 55, 65 (2006); Benoît Frydman, *L'affaire Total et ses enjeux*, *in* Liber amicorum Paul Martens 301-321 (2007).

[35] C. pén. (Fr.) Art. 85, 86.

[36] Loi no. 64-1236 du 26 déc. 1964; for a history of the antecedents to that legislation, see Vladimir Jankélévich, L'Imprescriptible. Pardonner? Dans l'honneur et la dignité (1971). For France's provision on universal jurisdiction, see C. proc. pén. (Fr.) Art. 689.

numbers of cases have involved Rwandan defendants, but a famous one, whose appeal by the defendant the European Court of Human Rights rejected,[37] involved the conviction by a French court of a Mauritanian army officer for acts of torture committed in Mauritania on Mauritanian nationals.[38] One of the most recent developments has been the creation of a special section of the Paris criminal court, the *Tribunal de grande instance,* that is dedicated to prosecuting genocide, war crimes and crimes against humanity, so as to develop special expertise in just such universal jurisdiction cases, with a certain number of judges devoted exclusively to them, and allowed to travel to conduct investigations outside of France with respect to acts alleged to have occurred in other countries.[39]

In Germany, victims of crimes also can join the criminal actions, although German victims may choose to sue in separate civil actions.[40] With respect to universal jurisdiction, Germany is particularly

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[37] ECtHR, 17 Mar. 2009, Ely Ould Dah v. France, App. 13113/03.

[38] Affaire Ould Dah, Cour d'assises du Gard (1er juillet 2005). See also the case known as the "Brazzaville Beach Case," in which the French Supreme Court for criminal law , the Court of cassation, allowed a criminal case to go forward in France concerning the disappearance of refugees who had been returned to The Republic of the Congo, Cass. ch. cr., pourvoi no. 07-86412, 9 Apr. 2008 (unpublished, available at Legifrance.gouv.fr.

[39] *See* Assemblée nationale, XIIIe legislature, 4 July 2011, available at http://www.assemblee-nationale.fr/13/cri/2010-2011-extra/20111001.asp.

[40] StPO §§ 403.

noteworthy in having enacted a Code of Crimes against International Law (*Völkerstrafsgesetzbuch*), whose first section specifies that it applies even when the offense was not committed in Germany and was without nexus to Germany.[41] After initially having an unrestrictedly victim-driven universal jurisdiction law under the traditional civilian concept of the prosecutor's role, Germany instituted prosecutorial discretion for universal jurisdiction cases, although such discretion is itself an appealable decision by the victim-complainants in some, but not all, cases.[42]

Given the structures of civilian legal systems, appellate Judge Cabranes considered that his task was to apply criminal law norms to the civil ATS action.[43] *Amici curiae* undertake that exercise to the extent that they analogize civilian criminal law to ATS tort law in this brief, but they also add the essential step of exploring the way that apparent legal categories actually operate in their respective systems. In applying those standards, *amici* reach a

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[41] VStGB §1.

[42] StPO§ 153f. For a discussion of the appealability of the prosecutor's decision not to pursue a universal jurisdiction case, see Kai Ambrose, *Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the "Torture Memos" Be Held Criminally Responsible on the Basis of Universal Jurisdiction?*, 42 Case W. J. Int'l L. 405, 429-439 (2009).

[43] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111, 146 (2d Cir. 2011). More generally, see Mireille Delmas-Marty, La refondation des pouvoirs (Les forces imaginantes du droit III) (2007).

different conclusion from that of the Second Circuit majority.

B. CIVILIAN CRIMINAL LAW AND UNITED STATES CIVIL LAW HAVE COMPARABLE FUNCTIONS IN THEIR RESPECTIVE LEGAL ORDERS AND SOCIETIES BECAUSE OF THE ROLES OF JUDGES, PROSECUTORS AND LAWYERS; THE PROCEDURES FOR, AND CONCEPTIONS OF, CRIMINAL AND CIVIL TRIALS, AND THE METHODS FOR VICITMS TO INITIATE LEGAL ACTIONS IN THE CRIMINAL COURTS OF CIVILIAN STATES AND IN TORT LAWSUITS IN THE UNITED STATES.

1. CIVILIAN JUDGES SPECIALIZE IN CRIMINAL OR PRIVATE LAW, WITH CRIMINAL-LAW JUDGES HAVING A MORE DIDACTIC, PUBLIC ROLE THAN THEIR PRIVATE-LAW COUNTERPARTS

Above all, in civilian systems the judges, rather than the lawyers, are the major institutional actors at the criminal trial,[44] with most facts generally having been conceded before the final, oral phase of the trial, rendering the trial itself secondary as a focus for determining facts.[45] Moreover, unlike

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[44] *See, e.g.*, Antoine Garapon & Ioannis Papadopoulos, Juger en Amérique et en France 107 (2003).

[45] *Id.* at 113; John Leubsdorf, *On the History of Legal Ethics*, 8 U. Chi. L. Sch. Roundtable 341 (2001).

in common-law legal systems, civilian criminal-law judges specialize solely in criminal cases. Perhaps most significantly, they play a role that is far more didactic than that of civilian judges sitting in non-criminal cases.

In France, traditionally, the victim's being part of a criminal prosecution has been particularly vital because the issues in French criminal law are not exclusively legal in nature. As a great figure in comparative law put it, "a Frenchman knows that it [i.e., criminal law] is not and cannot be law in the strict sense."[46] The criminal trial legitimately is part of a political statement: "A Frenchman will allow the government a degree of . . . even arbitrariness, that is hard to reconcile with the certainty characteristic of legal principles."[47] The judge is deemed to be the voice of the State for purposes of declaring the message of the trial; hence, the unified message of civilian court decisions that historically did not permit dissenting opinions.[48] A scholar has gone so far as to call the French criminal-law judge's role to be that of a "republican monarch."[49] The criminal

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[46] René David, French Law: Its Structure, Sources and Methodology 116 (Michael Kindred trans., 1972).

[47] *Id.* at 120.

[48] It is beyond the scope of this brief to enter into a broader discussion of the different understanding of the State itself in civilian systems, to which the attributes described herein are linked.

[49] P. le Quinquis, *Le Président de la cour d'assises*, 10 Rev. gén. dr. processuel, *quoted in* Stewart Field, *State, Citizen, and Character in the French Criminal Process*, 33 J. L. & Soc'y. 522, 540 (2006).

law judge conveys a social message beyond the adjudication of the guilt or innocence of the defendant.[50]

2. CIVILIAN PROSECUTORS TRADITIONALLY ARE NON-PARTISAN; CRIMINAL TRIALS ARE PUBLIC AND ORAL, WHILE CIVIL TRIALS OFTEN TAKE PLACE EXCLUSIVELY IN WRITING, GIVING THE PUBLIC NO OPPORTUNITY TO WITNESS THEM.

Of the legal actors involved in criminal trials in civilian systems, generally only the privately hired lawyers are not considered neutral, in contrast to the prosecutors.[51] In several civilian legal systems, such as France,[52] Belgium[53] and Italy,[54] prosecutors are magistrates, part of the bench, not the bar. Even where they are not members of the bench, as, for instance, in Germany[55] and Spain,[56]

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[50] *See* Field, *supra* last note, at 522, 527, 537.

[51] See, e.g., Ugo A. Mattei et al., Schlesinger's Comparative Law (7th ed., 2009); John Bell, French Legal Cultures 36 (Cambridge U.P., 2008) (2001).

[52] *See* Ordonnance no. 58-1270 du 22 déc. 1958 portant loi organique relative au statut de la magistrature, available on Legifrance.gouv.fr.

[53] Const. (Bel.) Art. 15 § 2.

[54] Const. (Ital.) Art. 104.

[55] Gerichtsverfassungsgesetz 9 May 1975, Teil X, Art.s 141-152. *But see* Eberhard Siegismund, The Public Prosecution Office in Germany: Legal Status, Functions and Organization, 58-76, at 64, in UNAFEI Annual Report for 2001 and Resource Materials Series No. 60 (Sean Eratt, ed., 2003) (describing German

prosecutors are non-partisan figures inasmuch as they are unelected civil servants whose professional advancement does not depend on obtaining convictions.[57] They are interested in discovering exculpating as well as inculpating evidence. In some countries, prosecutors may appeal *convictions*,[58] as they also can in the International Criminal Court.[59] While criminal trials in civilian States are supposed to be the trial of the defendant's guilt or innocence, where important public and historical matters have been involved, not only will they be reported in detail in the daily press, but schoolchildren have been brought to attend the trials in order to gain historical edification from what also is understood to be a pedagogical event, and even the trial of an historical period.[60]

Prosecutor's office as very close to judicial: "between judicature and administration" pursuant to the German Courts Constitution Act; and Philip Milburn & Denis Salas, *Les procureurs de la République: De la compétence personnelle à l'identité collective, in* Étude sociologique et etude comparative européenne 137 (CNRS, 2007) (describing the German prosecutor as having a strong sense of identification with the judge despite not formally being a magistrate).

[56] Estato Orgánico del Ministerio Fiscal 50/1981 (30 Dec. 1981).

[57] *See* Milburn & Salas, *supra* note 64; Mattei, *supra* note 64.

[58] *See, e.g.,* C. proc. pén. (Fr.) Art. 380-82.

[59] Rome Statute of the International Criminal Court Art. 81, July 17, 1998, 2187 U.N.T.S. 90.

[60] This occurred for example in France in the 1994 trial of Nazi collaborator Paul Touvier, which was seen by many as the nation's trial of Vichy France. *See* Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 Hastings L.J. 1, 79 (1998).

By contrast, civil (non-criminal) cases generally take place entirely in writing, with no oral testimony: "In the Continental [European] tradition, civil trials are unspectacular and decided by a judge at the close of a technical procedure, in contrast to the United States, where the civil trial has a much greater political resonance."[61] Not only are civil juries essentially nonexistent in civilian systems,[62] but generally no real equivalent to the U.S. concentrated oral civil trial exists. In some countries, like France, even writings such as parties' legal memoranda are kept outside of the public domain, as lawyers have intellectual property rights over their written product.

Where a crime against humanity case was asserted as a tort law case in France several years ago, public reaction against it was harsh, as it dealt with matters of public interest but yet necessarily, precisely because it had not been brought as a criminal action, it took place outside of the public eye.[63] It was criticized, among other things, as a privatization of justice, involving a matter of significance that the State should have been managing, rather than a privately hired lawyer who was being paid to make winning arguments for his client, and who, moreover, had no legal obligation to

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[61] Garapon, *Peut-on réparer l'histoire, supra* note 24, at 32.

[62] Some exceptions may now exist in former Soviet-bloc nations.

[63] *See* Curran, *supra*, note 16, at 373-375.

do more than that.[64] In the United States, by contrast, an ATS action would be more like a civilian criminal action for a *jus cogens* violation: it would take place around a concentrated oral event (our "trial")[65], would or could be heard by a jury, and would be in the eyes of the public with every possibility of public debate.

In *partie civile* countries, victims have considerable influence in instigating criminal actions, and can recover damages, such that, within those systems, there should be no reason to keep a public matter outside of the public, criminal law domain:[66] "Represented at the pre-trial and trial phases, the victim can not only claim damages, but can add a different voice to the discussion of the wrongdoing in question and its social

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[64] *See* Annette Wieviorka, *La SNCF, la Shoah et le juge*, 316 Histoire 89 (2007). More generally, see Curran, *supra*, last note, and sources cited therein.

[65] The word used to translate "trial" in the languages of most civilian States (e.g., Germany, France, Italy), is literally "process" rather than "trial" (respectively, "*Prozess*," "*procès*," "*prozesso*"), and indeed the concept is not one of a concentrated oral event as it is in common-law legal systems.

[66] Traditionally prosecutors have had no discretion in civilian systems. In cases dealing with universal jurisdiction, however, prosecutorial discretion of differing degrees has been instituted in Belgium and Germany. In France, some degree of prosecutorial discretion exists in what is known as the "*opportunité des poursuites*." Where a prosecutor decides against going forward, however, a *partie civile* plaintiff can trigger the action nevertheless through a *plainte par voie d'action*, although such a method is not always successful in triggering a prosecution. *See* Code de proc. pén. (Fr.) arts. 85-91, 418.

consequences."[67] Moreover, whereas the victim in a civilian system who is constituted as a *partie civile* benefits from the State's resources, in the United States, tort plaintiffs need not suffer from lack of personal resources because they generally are able to benefit from contingency fee arrangements. The latter are prohibited as unethical in most civilian States, making it difficult for many plaintiffs in those systems to sue privately.[68] In addition, punitive damages do not exist in civilian civil suits, as they are considered the exclusive prerogative of criminal law, since that body alone is deemed legally enabled to deal in "punitive" measures.[69]

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[67] Bell, supra note 51, at 141.

[68] Germany and Switzerland have cases to this effect dating to the early 1900s. For Switzerland, see, e.g., BGE 41 474 (3 Juli 1915); for Germany, RGZ 142, 70 (20 Okt. 1933), confirmed in more recent cases in BGHZ 34, 64 (15 Dez. 1960), 16 N.J.W. 1147 (1963), and BGHZ 40 N.J.W. 3203 (1987), as well as federal law, BGBl 1957 I 907; for France, see Loi no. 71-1130 du 31 déc. 1971, art. 10, al. 3. The Code of Conduct for European Lawyers, to which all Member States adhere forbids the "pactum quota litis" or contingency fee arrangement in Section 3, at 15. On the Code, see Virginia G. Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 N.W. J. Int'l. L. & Bus. at 317-319 (1999).

[69] *See* John Henry Merryman et al., The Civil Law Tradition: Europe, Latin America, and East Asia 1022 (1994). A major source of difficulty in the enforcement of United States judgments in civilian States has been punitive damages, as they traditionally have been considered against the public policy of States with civil-law legal systems. *See, e.g.,* Helmut Koziol, *Punitive Damages – A European Perspective*, 68 La.L.Rev. 741, 751 (2008).

By contrast, in the United States, where victims do not determine if criminal cases go forward, prosecutorial discretion would imperil those actions where prosecutors did not see traditional advantages to such suits. Another contrast between the two systems of law arises in that, in civilian countries, the deeply entrenched requirement that justice be "individualized"[70] results in a stranglehold on class action suits, entailing the need for individual plaintiffs in non-criminal actions to sue on their own, despite the unavailability of contingency fee arrangements, and despite the disincentive to litigate that comes from the civilian practice that an unsuccessful party will be assessed with the costs and legal fees for both sides.[71]

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[70] In France, see the Constitution, Art. 66, and the N.C. proc. civ. Art. 31, which latter specifically requires that the interest in a cause of action be direct and personal. A common legal maxim has it that "no one may plead through a third party." ("*Nul ne plaide par procureur*").

[71] With respect to class action suits, analogies sometimes are made between "collective actions" in civilian States and United States class action suits. Civilian collective actions tend to be in the context of a professional organization that has been given the right to represent its membership, and, even in such cases, only where a specific member has requested the legal representation, as opposed to an "opt out" choice. *See, e.g.*, Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 Notre Dame L.J. 313 (2011).

3. INTERNATIONAL CONSENSUS AS TO *JUS COGENS* CRIMES HAS LED TO BOTH UNIVERSAL JURISDICTION AND TO CRIMINAL AND TORT RECOVERY

Piracy was the crime acknowledged as the "first violation of customary international law [and] the first stone in the edifice of a universal punishment reserved, today, for the gravest of crimes. It is the oldest 'crime of the law of nations' committed outside the context of war whose 'perpetrators can be seized by any nation whatsoever and judged by its courts.'"[72]

Pursuant to national legal practices generally, and in all of the States discussed in Section II, A above, both criminal and tort recovery are forthcoming for crimes against humanity. As Justice Breyer stated in *Sosa*,

> international law will sometimes ... reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction

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[72] Sévane Garibian, Le crime contre l'humanité au regard des principes fondateurs de l'État moderne. Naissance et consécration d'un concept, 80 (2009), *citing in part* J. Jeannel, La piraterie 1 (1903). *See also id.* (Garibian) at 80 (the crime against the law of nations is the ancestor of the crime against humanity of Nuremberg).

exists to prosecute a subset of that behavior.[73] That subset includes torture, genocide, crimes against humanity, and war crimes.[74]

The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not

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[73] *Sosa*, 542 U.S. at 762 (Breyer, J., concurring), *citing* Restatement (Third) of Foreign Relations Law of the United States §§ 402(1), (2) (1986) ("Restatement"), and Comment *a*; International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences 2 (2000).

[74] *Id.*, *citing* International Law Association, *supra* last note, at 5-8; *Prosecutor v. Furundzija*, Case No. IT–95–17/1–T, ¶¶ 155–156 (International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Territory of Former Yugoslavia Since 1991, Dec. 10, 1998); *Attorney Gen. of Israel v. Eichmann*, 36 I.L.R. 277 (Sup.Ct. Israel 1962).

significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. [75] That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself.[76] Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.[77]

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[75] *Id., citing* Restatement § 404, Comment *b.*

[76] *Id.* at 762-63, *citing* Brief for European Commission as *Amicus Curiae* 21, n. 48 (citing 3 Y. Donzallaz, La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, ¶¶ 5203–5272 (1998); EC Council Regulation Art. 5, § 4, No. 44/2001, 2001 O.J. (L 12/1) (Jan. 16, 2001)).

[77] *Id.* at 763.

Different civilian legal systems contemplate civil tort recovery in various ways, although often through the victim joining the criminal trial as a civil party.[78]

A web of interrelated associations make it difficult for the structures of civilian legal orders to accommodate civil tort trials where the underlying act is a grave violation of human rights that has not yet been adjudicated as such.[79] In his dissent in *Rio Tinto*, Judge Kleinfeld approved of universal jurisdiction in such cases of human rights violations that were the subject of criminal trials, but concluded that ATS liability, by contrast, should not be extraterritorial because tort law is private law, whereas criminal law, as public law, involves the State.[80] However, due to the differing roles of judges, of prosecutors and of plaintiffs' access to courts, as well as the deep-seated self-understandings of the nature of the judicial system in the respective legal orders, the tort action in the United States is analogous and equivalent, although

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[78] France: C. Pén., art. 4, 85, 86; Germany: StPO §§ 403-406c; 395 ("*Nebenklager*" procedure, whereby the victim becomes a kind of supplemental prosecutor); Italy: C. proc. pen., art.s 410, 496, 523.

[79] In his proposal for a civil remedy for acts leading to catastrophic-level harm, regardless of whether the underlying act was criminal or tortious in nature, Calais-Auloy notes that such a cause of action would not be cognizable within French legal categories such as they are today. *See* Jean Calais-Auloy, *Les délits à grande échelle en droit civil français*, 2 R.I.D.C. 379, 387 (1994).

[80] Sarei v. Rio Tinto PLC, 671 F.3d 736, 805 (2011) (Kelinfeld, J., dissenting).

not identical, to that of the criminal action in civilian legal orders in the matters of principal interest for civilian criminal extraterritorial jurisdiction.

CONCLUSION

It now becomes clearer that tort law in the United States fulfills many of the functions of criminal law in civilian States in the context of the grave violations of human rights that are one of the subjects of the ATS: both offer a forum in which to publicize the defendant's criminal acts and the victim's suffering; both represent a search for justice; and both offer a means for financial redress. It would not be accurate to *equate* the functions of civilian criminal law with those of U.S. tort law, as each retains distinctions linked to different histories and traditions. In particular, the manner in which the State legitimates criminal-law trials in France is not equaled by the public aspects and punitive damages of the United States tort trial.[81]

On the other hand, the major impediments in civilian legal systems to contemplating extraterritorial *civil* jurisdiction for *jus cogens* violations are not problems in the United States tort system: namely, that civilian civil trials tend not to be centered around an oral trial phase; that civilian system victims would not be able to discover information without the assistance of the State through the prosecutor's office; that, unless wealthy (or poor enough to qualify for legal aid), victims would not have access to courts in civil cases; and

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[81] Curran, supra note 16, at 383.

that civilian civil trials do not play out in the public realm, such that important issues are not aired in public in the same manner as in criminal cases.

Conversely, the aspects of criminal trials in civilian States which render extraterritorial or universal criminal jurisdiction appropriate do exist in U.S. tort law: both are aired in public; both allow victims effective access to the court system; and both allow victims financial compensation. Whereas in civilian States, universal jurisdiction legislation that started without any prosecutorial discretion, due to the traditional theory that all crimes had to be prosecuted, have tended to institute some measure of discretion so as to rein in the consequences of uncontrolled victim-triggered criminal actions, so too in the United States, the Act of State doctrine[82] and the Foreign Sovereign Immunities Act[83] perform a similar function for ATS suits. Both legal orders can allow for the adjudication of that most highly restricted number of heinous crimes that the international community considers to be the province of each and every nation, namely the *jus cogens* violation, even if committed by a foreigner, against a foreign plaintiff, and even if committed in a foreign land. Extraterritorial civil jurisdiction under the ATS is analogous and equivalent to the extraterritorial or universal criminal jurisdiction that civil-law systems accept as a part of modern international law and, increasingly, national law.

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[82] *See* Underhill v. Hernandez, 168 U.S. 250 (1897); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
[83] 28 U.S.C. §§ 1602-11.

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APPENDIX

George A. Bermann is the Walter Gellhorn Professor of Law at Columbia University, where he also is the Jean Monnet Professor of EU Law. He is a past President of the International Academy of Comparative Law and of the American Society of Comparative Law. He currently serves as Chief Reporter for the American Law Institute, Restatement (Third) U.S. Principles of International Commercial Arbitration and is the Director of the American Arbitration Association. Among his numerous publications are Transnational Litigation (West), and Cases and Materials on European Union Law (West). He has been a Visiting Professor of Law at the Institut des Sciences Politiques (Sciences Po) in Paris and the Collège d'Europe in Bruges, Belgium.

Vivian Grosswald Curran is Distinguished Faculty Scholar, Professor of Law at the University of Pittsburgh. She is a past U.S. member of the Austrian General Property Settlement Fund Committee for Nazi expropriations on the territory of Austria, for which work she was decorated by the President of the Austrian Republic. She specializes in comparative and international law and is the author, among others, of Comparative Law: An Introduction (2002); *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 36 Am. J. Comp. L. 363 (2008), and *Édouard Laboulaye, le droit comparé et la démocratie américaine*, 3 Rev. Int. Droit Comparé

547 (2012). In March, 2012, she spoke about comparative law insights for ATS liability in Kiobel v. Royal Dutch Petroleum Co. at Stanford University, U. Cal. Davis, and as a panelist at Georgetown University School of Law, and in April, 2012, at the Collège de France, in Paris.

Mireille Delmas-Marty is emerita Professor of Law at the Collège de France, Paris, France, where she held the Chair of Comparative Law and Internationalization of Law from 2002-2011. Elected to the French *Académie des sciences morales* in 2007, she also is the recipient of eight honorary doctorates and numerous prizes, and has been a Visiting Professor of Law in Belgium, Brazil, Canada, China, Great Britain, Italy, Mexico and Switzerland. She also has been an invited speaker at, among many other institutions, the International Criminal Court at The Hague, Columbia University and Cambridge University. She has served on numerous governmental committees, including for the President of France, to study revisions of the Constitution, and chaired the Ministry of Justice Committee on reforming the structure of France's criminal law. Her prolific writing includes works translated into English, such as European Criminal Procedure (ed. with J. Spencer, 2002); Ordering Pluralism : A Conceptual Framework for Understanding the Transnational Legal World (trans. N. Norberg, 2009); China, Democracy, and Law: A Historical and Contemporary Approach, ed. with Pierre-Etienne Will (trans. N. Norberg, 2012).

Olivier Dutheillet de Lamothe is a Justice of France's Supreme Court of Public Law, or *Conseil d'État*, as well as former and Honorary Justice of France's Constitutional Council (*Conseil constitutionnel*), where he completed the maximum term permissible under law after having served nine years as Constitutional Council Justice, from 2001 to 2010. His career has alternated between industrial relations and public law. He was Advocate General (*Commissaire du Gouvernement*) at the Judicial Section of the *Conseil d'Etat* from1981 to1986, Director of Industrial Relations at the Department of Labor from 1987 to 1995, Social Advisor (*Conseiller social*) to the President of the Republic from 1995 to 1997, and Deputy General Secretary of the French Presidency from 1997 to 2000 until his appointment by President Chirac to the Constitutional Council in March 2001. In 2010, President Sarkozy appointed him to the *Conseil d'Etat* where he was named President of the Social Section on March 1, 2011. He also has been a Professor at the Institute of Political Studies in Paris (Sciences Po) and has published in the areas of French and European, constitutional and labor law.

Antoine Garapon is Secretary General of the *Institut des Hautes Etudes sur la Justice*. He served for many years as a judge and continues to teach French judges at the *Ecole de la magistrature*. He is editor of the journal *Esprit* and of the collection *Bien*

commun at Michalon Publishing, and is the author of dozens of works in the areas of comparative and international law. He also is a prominent public figure in France. He specializes, among others, in the comparison between civilian and common-law legal systems and cultures, and has written a book about the spread to civilian systems of the civil reparation damages suit for *jus cogens* crimes: Peut-on réparer l'histoire? Colonisation, esclavage, Shoah (2008). Other notable books, among many, are Juger en Amérique et en France (with Ioannis Papadopoulos, 2003), and Les vertus du juge (with Julie Allard and Frédéric Gros, 2008).

Christian Joerges is a Research Professor at the Law Faculty of Bremen University, Germany, and, since 2008, Co-Director of the Centre of European Law and Politics. Until 2007 he held the chair for European Economic Law at the European University Institute in Florence, Italy. He has been a Visiting Professor at various Law Faculties in the United States and Europe, including New York University and Columbia University, and has been a Fellow at the Institutes for Advanced Study in Wassenaar, The Netherlands and Berlin, Germany. He holds an Honorary Doctoral Degree in Law from the University Fribourg, Switzerland. His research deals with the Europeanization of private and economic law, transnational risk regulation governance structures, constitutionalism in the post-national constellation, and anti-liberal traditions of German legal thought. Among his work published in

English are Darker Legacies of Law in Europe (ed. with Navraj Ghaleigh, 2003); Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets (ed. with Josef Falke, 2011); Constitutionalism, Multilevel Trade Governance and International Economic Law (ed. with Ernst Ulrich Petersmann, 2011); and the anthology, Jürgen Habermas, vol.s I and II (ed. with Klaus Günther and Camil Ungureanu, 2011).

Amalia J. Kessler is the Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies at Stanford University Law School, where she also is Professor of History by courtesy. Her work focuses on the evolution of commercial law, civil procedure, and the origins of the American adversarial legal culture. In 2008, her book, A Revolution in Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France (2007), was awarded the American Historical Association's J. Russell Major Prize. In 2011, she received the American Society of Comparative Law's prize for the most outstanding article published by a scholar under the age of 40 in the American Journal of Comparative Law. She has been a Visiting Professor at the Université Panthéon-Assas (Paris II) and the Ecole des hautes etudes en sciences sociales. Before joining Stanford University, Professor Kessler was a trial attorney in the Civil Division of Justice and clerked for Judge Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit.

Hélène Ruiz-Fabri is Dean of the Sorbonne Law School (Paris I). She also is Director of the Institute of Comparative Law of Paris I (*UMR de droit comparé - Paris I/CNRS*) and of the Master 2 Program in International Economic Law. She teaches and does research in International Law, WTO Law, Comparative Law, International Dispute Settlement, European Court of Human Rights Law, and has numerous publications in these fields, especially in WTO Dispute Settlement and Comparative International Dispute Settlement Law. She has taught at the Academy of International Law at The Hague and at the Academy of European Law in Florence. She is a past President of the European Society of International Law, and has been a legal consultant at the Council of Europe on the ratification and implementation of the European Convention on Human Rights in East European countries. She also has been a legal consultant for the French government and at the *Agence internationale de la Francophonie*. She has written and edited several books and numerous articles on international and comparative law, especially relating to international courts and tribunals, among which are Droits constitutionnels européens (with C. Grewe, 1995); Droit commun et droit comparé – Actes des premières Rencontres de l'UMR de droit comparé (ed., with M. Delmas-Marty & H. Muir Watt, 2002); and La jurisprudence de l'O.M.C./The Case-Law of the WTO, 1996- 1997 (ed., with B. Stern, 2004).